tion 14 (a) relating to misleading advertising of injurious foods and drugs, there would be little point in the addition of the new sections, since the overwhelming majority of cases falling within these provisions could have been brought within the amended section 5. There is also some logic in the contention that the criminal penalties could have been more easily provided for by amending the Pure Food and Drug Act to include advertisements as well as labels. Of course, there will be need for considerable judicial construction of the amended Act. In retrospect, its defects, if any, are confined to attempting more than is necessary, a fault much more easily forgiven than the omission of an essential provision.

R. L. F.

NOTES

Dividends Subject to Apportionment Under the Doctrine of Earp's Appeal

The general topic of the "Pennsylvania" doctrine of *Earp's Appeal*[1] and its modern developments has been the subject of extended discussion.[2] By way of summary, it may be said that in construing a will whereby a testator leaves shares of corporate stock in trust, providing simply that the income should go to one beneficiary for life with remainder over,[3] the courts have handled the problem of allocation of dividends in a number of ways. In Kentucky, for instance, all dividends of any sort declared from surplus during the period of the trust go to the life tenant regardless of when the surplus was accumulated.[4] According to the "Massachusetts" rule, on the other hand, all cash dividends are awarded to the life beneficiary and all stock dividends to the corpus.[5] Pennsylvania and several other states[6] have rejected these rules of thumb and have provided that all proceeds in liquidation and certain dividends from earnings shall be apportioned between life tenant and remainderman. The aim of such apportionment is to allocate to the life tenant all payments arising from earn-

1. 28 Pa. 368 (1857).

2. The clearest and most comprehensive treatment of the law on this subject will be found in 4 BOGERT, TRUSTS AND TRUSTEES (1935) §§ 841-857. Other recommended expositions and collections of cases can be found in: Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1907); HOWES, INCOME AND PRINCIPAL (1905) 17-49; 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) §§ 465-471; 2 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) §§ 544-546d; Brigham, *Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees from Shares of Stock* (1937) 85 U. OF PA. L. REV. 358; Notes (1923) 23 COL. L. REV. 369, (1930) 44 HARV. L. REV. 101, (1935) 83 U. OF PA. L. REV. 773; (1937) 46 YALE L. J. 552; Notes (1892) 16 L. R. A. 461, (1907) 12 L. R. A. (N. S.) 768, (1911) 35 L. R. A. (N. S.) 563, (1914) 50 L. R. A. (N. S.) 510, L. R. A. 1916D 211, (1923) 24 A. L. R. 9, (1926) 42 A. L. R. 448, (1927) 50 A. L. R. 375, (1928) 56 A. L. R. 1287, (1929) 59 A. L. R. 1532, (1931) 72 A. L. R. 981, (1933) 83 A. L. R. 1261, (1936) 101 A. L. R. 1379.

3. If the intent of the testator is expressly stated in the will, it is of course controlling if legal. Robinson's Trust, 218 Pa. 481, 67 Atl. 775 (1907); see Jones v. Integrity Trust Co., 292 Pa. 149, 156, 140 Atl. 862, 864 (1928).
L. REV. 773, (1937) 46 YALE L. J. 552; Notes (1892) 16 L. R. A. 461, (1907) 12 L. R. A.

4. Hite v. Hite, 93 Ky. 257, 20 S W. 778 (1892); Hubley v. Wolfe, 259 Ky. 574, 82 S. W. (2d) 830 (1935) (300% stock dividend and large cash dividend from earnings which accrued to the corporation before the creation of the trust all awarded to tenant).

5. Minot v. Paine, 99 Mass. 101 (1868); Powell v. Madison Safe Deposit and Trust Co., 208 Ind. 432, 196 N. E. 324 (1935).

6. 4 BOGERT, *op. cit. supra* note 2, § 850, lists the following jurisdictions as having adopted the Pennsylvania rule: California, Delaware, Iowa, Maryland, New Jersey, South Carolina, Tennessee, Vermont, Wisconsin, Hawaii.

ings of the corporation during the trust period, and to preserve for the corpus the intact value (usually the book value) of the shares as of the date when the trust was created, plus any purely capital gains.[7]

What can properly be considered a liquidation of capital assets in this respect is a separate problem.[8] Here, we are concerned only with what dividends from earnings are to be apportioned under the Pennsylvania rule. Although the courts of New Jersey have shown a tendency to apportion dividends of any sort,[9] it has generally been held elsewhere that only *extraordinary* dividends are apportionable,[10] while *ordinary* dividends go to the person entitled to the income of the estate at the date of declaration without investigation into their source.[11] A determination of what is meant by the terms ordinary and extraordinary in this connection would seem to be an important prerequisite to the satisfactory operation of the apportionment rule. The common understanding of the phrases is becoming increasingly confused as a result of the growing tendency on the part of many corporations to adopt an irregular dividend policy. Dividends at a fixed and uniform rate are becoming rare; in many instances it has become "the ordinary practice of the corporation to declare a series of extraordinary dividends".[12] Coincident with this development, the Pennsylvania

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7. See Evans, *Calculating the Distribution of a Stock Dividend Between Life Tenant and Corpus* (1929) 77 U. OF PA. L. REV. 981. It makes no difference, of course, if the trust is *inter vivos;* and it has been held that the same rules are applicable as between successive life beneficiaries. Graham's Estate, 296 Pa. 436, 146 Atl. 111 (1929); Neafie's Estate, 325 Pa. 561, 191 Atl. 56 (1937). No distinctions along these lines will be made in this Note.

Literally speaking, an *apportionment* occurs only when a dividend is earned by the corporation partly during and partly before the trust period. In this discussion, however, the term will be used as synonymous with *allocation according to date of earning;* thus, the term will be applied without distinction to those cases where the dividend was earned by the corporation wholly before the creation of the trust and awarded in its entirety to the remainderman.

8. The simplest case of liquidation is, of course, the dissolution of the corporation. Whether there has been a partial liquidation is often difficult to decide—as in the case of dividends from the depletion reserve of a mining company, *In re* Knox's Estate, 195 Atl. 28 (Pa. 1937); or of proceeds from the sale of land by a land company. Matter of Jackson, 258 N. Y. 281, 179 N. E. 496 (1932). For discussion of these and other complications, see 4 BOGERT, *op. cit. supra* note 2, § 855; Brigham: *Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees from Wasting Property,* (1938) 86 U. OF PA. L. REV. 471. A sale of stock by the trustee has been held a "liquidation" of the estate's interest in the corporation, hence an occasion for apportionment. Matter of Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19 (1st Dep't, 1917); Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927), Note (1928) 76 U. OF PA. L. REV. 589.

9. In Lang v. Lang, 57 N. J. Eq. 325, 41 Atl. 705 (1898), it was held that all dividends, ordinary and extraordinary, should be apportioned. Dividends admittedly ordinary were apportioned according to date of earnings in: Hewitt v. Hewitt, 113 N. J. Eq. 299, 166 Atl. 528 (Ch. 1931); City Bank Farmers' Trust Co. v. McCarter, 111 N. J. Eq. 315, 162 Atl. 274 (1932); Graves v. Graves, 115 N. J. Eq. 547, 171 Atl. 681 (1934). But such apportionment of ordinary dividends was refused in: National Newark and Essex Banking Co. v. Work, 109 N. J. Eq. 468, 158 Atl. 109 (Ch. 1932); Bankers Trust Co. v. Lobdell, 116 N. J. Eq. 363, 173 Atl. 918 (Ch. 1934) (per diem apportionment of first ordinary dividend). Apparently the law of New Jersey is still unsettled on this point; see Okin and Brandchaft, *Problems of Trust Administration in New Jersey* (1935) 4 MERCER BEASLEY L. REV. 31, 147, at 151.

10. Flaccus's Estate, 283 Pa. 185, 129 Atl. 74 (1925).

11. Opperman's Estate (No. 1), 319 Pa. 455, 179 Atl. 729 (1935) (ordinary dividends not apportionable in the absence of "unusual circumstances"—i. e. a liquidating dividend; see *supra* note 8); *In re* Knox's Estate, 195 Atl. 28 (Pa. 1937). *Cf.* Matter of Villard, 147 Misc. 472, 264 N. Y. Supp. 236 (Surr. Ct. 1933). See *infra* notes 42 and 45.

12. Brigham, *supra* note 2, at 370. This tendency was noted in Matter of Osborne, 209 N. Y. 450, 474, 103 N. E. 723, 730 (1913). It has been augmented recently by the tax on undistributed profits, 49 STAT. 1655 (1936), 26 U. S. C. A. § 13a (Supp. 1936). The same law, however, will possibly simplify apportionment problems by reducing the number of surpluses accumulated over long periods of years.

view, once generally approved by legal commentators, has fallen from favor.[13] Inasmuch as the apportionment doctrine is usually criticized for its impracticability and for the burden of uncertainty it places upon trustees,[14] it would seem desirable to clarify the doctrine wherever possible. Admitting the impossibility of finding a test which would determine automatically whether a given dividend is ordinary or extraordinary, nevertheless the basis for the distinction could be more definitely settled. Strangely enough, this aspect of the problem has been almost neglected by courts and commentators and the available authority is often curiously confused and contradictory.

The necessity for distinguishing between ordinary and extraordinary dividends first arose in the old English cases, where all ordinary dividends were awarded to the life tenant and all extraordinary dividends to the corpus.[15] It is interesting to note in these old cases that the designation placed upon the distribution of earnings by the corporation was generally regarded as conclusive. Thus, what the corporation labelled "an extraordinary dividend" or a "bonus" was awarded to corpus, while what was declared simply as a "dividend" went to the tenant, with little regard to the form of the payments or their relative size.[16] However, this basis for distinguishing ordinary from extraordinary dividends under the rule of equitable apportionment is rarely mentioned by modern courts,[17] although it might have an unrecognized effect on modern decisions. But it is interesting to note that the *Restatement of Trusts* mentions as one of the factors to be considered in classifying a dividend "the designation, if any, placed upon it by the directors of the corporation".[18]

Modern courts, in classifying dividends, have been mainly influenced by the degree of regularity in amount and interval. Thus, ordinary dividends have been defined as "periodical payments becoming due at fixed intervals",[19] as dividends "regularly declared at uniform intervals and rates theretofore or customarily used",[20] or as "usual or customary dividends at a fixed per cent or sum per share, paid at regular periods".[21] It is true that no dividend fulfilling these requirements would be termed extraordinary. But these definitions are of little

13. In the following cases the problem of allocating dividends was considered for the first time and the Pennsylvania rule rejected. Powell v. Madison Safe Deposit and Trust Co., 208 Ind. 432, 196 N. E. 324 (1935); *In re* Joy's Estate, 247 Mich. 418, 225 N. W. 878 (1929); Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 298 S. W. 91 (1927). The Uniform Principal and Income Act, 9 U. L. A. 196 (Supp. 1936), is modelled after the Massachusetts rule and has been adopted by two states: 5 ORE. CODE ANN. (Supp. 1935) tit. 63, §§ 1201-1214; Va. Laws 1936, 1024. A New York statute, N. Y. CONS. LAWS (Cahill, 1930) c. 42, § 17a, has provided that all stock dividends must go to corpus regardless of when earned. True, the RESTATEMENT, TRUSTS (1935) § 236, adopted the Pennsylvania rule, but see the argument that preceded the adoption of this section, 11 PROC. AM. LAW INST. 184 (1934).

14. See *supra* note 13. See also Bryan v. Aikin, 10 Del. Ch. 446, 465, 86 Atl. 674, 682 (1913); 4 BOGERT, *op. cit. supra* note 2, § 857.

15. Brander v. Brander, 4 Ves. 800 (Ch. 1799).

16. Irving v. Houston, 4 Paton 521 (H. L., Scot. App. 1803); Paris v. Paris, 10 Ves. 184a (Ch. 1804) ("As to the distinction between stock and money, that is too thin."—*id.* at 190); Clayton v. Gresham, 10 Ves. 287a (Ch. 1804); Witts v. Steere, 13 Ves. 363 (Ch. 1806); Hooper v. Rossiter [1825] M'Clel. 527 (Ex. 1824); Price v. Anderson, 15 Sim. 473 (Ch. 1847) ("bonus" of 5% to corpus, although "dividend" of 12½% to tenant); Bates v. Mackinley, 31 Beav. 280 (Ch. 1862) ("bonus" of 649 pounds to corpus, although "dividends" of 344 and 1055 pounds to tenant). *Cf.* Barclay v. Wainewright, 14 Ves. 66 (Ch. 1807); Preston v. Melville, 16 Sim. 163 (Ch. 1848). These cases have become obsolete with the decision of Bouch v. Sproule, 12 App. Cas. 385 (1887), in which a rule similar to the Massachusetts rule was adopted.

17. But *cf.* Citizens and So. Nat. Bank v. Fleming, 181 Ga. 116, 181 S. E. 768 (1935).

18. § 236 (a), comment *c* (5).

19. Earp's Appeal, 28 Pa. 368, 374 (1857).

20. Opperman's Estate (No. 1), 319 Pa. 455, 461, 179 Atl. 729, 733 (1935).

21. Nirdlinger's Estate, 290 Pa. 457, 462, 139 Atl. 200, 202 (1927).

value in that they are too narrow to include within their terms dividends which have been found to be ordinary and non-apportionable. It is clear from the cases that courts will refuse to apportion dividends whose rate and interval are neither "fixed", "regular", nor "uniform".[22] Furthermore, such definitions could not possibly explain why the payment of accumulated back dividends on preferred shares should be considered an "ordinary" dividend and not apportioned, and yet courts that have been presented with this problem have so held.[23]

Other elements have entered into the definition of apportionable dividends but merely with the result of further confusion rather than clarification. The *Restatement of Trusts,* for example, after setting forth the rule that ordinary dividends are not apportionable regardless of the time when the earnings were made,[24] curiously begs the question by mentioning as one of the factors which may be of importance in determining whether a dividend is ordinary "the source of the earnings from which the distribution is made".[25]

The most disturbing element in this phase of the law is the emphasis some courts have placed on the form of the dividend in question—i. e., whether it was declared in cash or stock. Thus, it has been indicated in Rhode Island that only unusual cash dividends are apportionable, all stock dividends going to the corpus regardless of when they are earned by the corporation.[26] On the other hand, one Maryland case held that only stock dividends were apportionable, all cash dividends going to the tenant.[27] While these decisions can be explained as variations of the orthodox Pennsylvania doctrine,[28] the language of certain opinions even in Pennsylvania would seem to indicate that no straight cash dividend can be extraordinary, while stock dividends are apportionable per se. This theory that the form of the dividend is controlling can be traced to the first *Nirdlinger's Estate* where extraordinary dividends are described as those payments which "may assume an unusual form and amount".[29] Five years later in *Waterhouse's Estate,* one finds an unexplained reference to "extraordinary dividends, commonly called stock dividends".[30] The climax of this tendency to emphasize form came in the recent case of *Nirdlinger's Estate (No. 1)* where the court declared that an unusually large dividend could not be considered extraordinary, because it was paid in cash.[31] Furthermore, the language of certain authorities apparently lends support to the converse of this theory by indicating that stock divi-

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22. See *infra* note 54.

23. Thompson v. New York Trust Co., 107 Misc. 245, 177 N. Y. Supp. 299 (Sup. Ct. 1919), *aff'd without opinion,* 191 App. Div. 904, 181 N. Y. Supp. 956 (1st Dep't, 1920); Crozer's Estate, 27 Pa. D. & C. 179 (1936); RESTATEMENT, TRUSTS (1935) § 236, comments *o* and *p;* Brigham, *supra* note 2, at 373.

24. RESTATEMENT, TRUSTS (1935) § 236 (a) and comment *d.*

25. *Id.,* comment *c* (6). *Cf.* Matter of Jackson, 135 Misc. 329, 332, 239 N. Y. Supp. 362, 366 (Surr. Ct. 1929), where a dividend was termed extraordinary because it was "a distribution of assets"—an obvious confusion between liquidating dividends and extraordinary dividends from earnings.

26. Rhode Island Hospital Trust Co. v. Tucker, 51 R. I. 507, 155 Atl. 661 (1931).

27. Northern Central Dividend Cases, 126 Md. 16, 94 Atl. 338 (1915).

28. The Rhode Island case, *supra* note 26, is to be explained as an attempt to reconcile the holding of Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 107 Atl. 209 (1919), which was based on the Pennsylvania rule, with the previously adopted Massachusetts rule.

The Maryland case, *supra* note 27, was plainly out of line with the previous case of Foard v. Safe Deposit & Trust Co., 122 Md. 476, 89 Atl. 724 (1914). Neither case has been expressly overruled, but the orthodox Pennsylvania rule has been set forth in later cases. See Baldwin v. Baldwin, 159 Md. 175, 178, 150 Atl. 282, 283 (1930). For a review of the Maryland cases, see (1938) 86 U. OF PA. L. REV. 681.

29. 290 Pa. 457, 462, 139 Atl. 200, 202 (1927).

30. 308 Pa. 422, 428, 162 Atl. 295, 296 (1932).

31. 327 Pa. 160, 168, 193 Atl. 33, 37 (1937), 86 U. OF PA. L. REV. 111. Strictly speaking this was dictum, for the issue was not properly raised on appeal.

dends are always apportionable.[32] Indeed, the theory that form is conclusive in the classification of dividends might appear to be born out by the fact that cases in which straight cash dividends have been apportioned are relatively rare.[33]

However, the theory that only stock dividends or their equivalents are apportionable is flatly opposed to the Pennsylvania rule as stated by most authorities. Ever since *Earp's Appeal,* the courts have consistently declared that the form of a dividend is immaterial,[34] and it has been on this basis that the Massachusetts rule of awarding all stock dividends to corpus and cash to life tenants has been criticized as arbitrary.[35] The statement that extraordinary dividends are apportionable "whether they be in cash, or scrip, or stock" [36] has become a by-word in those states following the Pennsylvania rule. The scarcity of cases involving extraordinary cash dividends is due not to any widespread legal principle against apportioning such dividends but to the fact that corporations rarely have sufficient funds on hand to make large cash distributions. Likewise, the practice of declaring regular stock dividends of small amounts is quite unusual and has arisen as a peculiarly modern phenomenon probably unheard of by the earlier writers.[37] Only one case has been found where such a dividend was litigated in an apportionment state and there it was treated as an ordinary dividend and awarded to the life beneficiary without investigation into its source.[38]

Thus, authorities are confused as to the factors to be considered in determining whether a dividend is apportionable,[39] and no satisfactory definition of

32. See HOWES, *op. cit. supra* note 2, at 28; Evans, *supra* note 7, at 984.

33. Only four cases have been found where straight cash dividends have been treated as extraordinary under the Pennsylvania rule: Citizens and So. Nat. Bank v. Fleming, 181 Ga. 116, 181 S. E. 768 (1935); Foard v. Safe Deposit & Trust Co., 122 Md. 476, 89 Atl. 724 (1914); Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 107 Atl. 209 (1919); Estate of Dittmer, 197 Wis. 304, 222 N. W. 323 (1928); *cf.* Oliver's Estate, 136 Pa. 43, 20 Atl. 527 (1890). Where cash is distributed with a corresponding allotment of subscription rights, the courts have not hesitated to grant an apportionment, although a distribution of this sort might be regarded as in effect a stock dividend. Smith's Estate, 140 Pa. 344, 21 Atl. 438 (1891); Stokes' Estate (No. 1), 240 Pa. 277, 87 Atl. 971 (1913); Thompson's Estate, 262 Pa. 278, 105 Atl. 273 (1918). Cash liquidation-dividends are of course apportionable but those are governed by different rules. Vinton's Appeal, 99 Pa. 434 (1882). See also *supra* note 8.

34. See Matter of Osborne, 209 N. Y. 450, 477, 103 N. E. 723, 731 (1913); Earp's Appeal, 28 Pa. 368, 374 (1857); Wiltbank's Appeal, 64 Pa. 256, 260 (1870); Moss's Appeal, 83 Pa. 264, 269 (1877); Mandeville's Estate, 286 Pa. 368, 370, 133 Atl. 562, 563 (1926); 7 THOMPSON, CORPORATIONS (3d ed. 1927) § 5403; Brigham, *supra* note 2, at 372.

35. See Vinton's Appeal, 99 Pa. 434, 441 (1882); Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 370, 107 Atl. 209, 211 (1919); 7 THOMPSON, *op. cit. supra* note 34, § 5399.

36. Smith's Estate, 140 Pa. 344, 352, 21 Atl. 438 (1891).

37. 19 FLETCHER, CORPORATIONS (Perm. ed. 1933) § 9043.

38. Matter of Villard, 147 Misc. 472, 264 N. Y. Supp. 236 (Surr. Ct. 1933) (also held not subject to the statute allocating all stock dividends to corpus, N. Y. CONS. LAWS (Cahill, 1930) c. 42, § 17a). *Cf.* Rhode Island Hospital Trust Co. v. Tucker, 51 R. I. 507, 155 Atl. 661 (1931), where a regular stock dividend was awarded to corpus following the Massachusetts rule. Unless the Massachusetts rule is modified, it will do substantial injustice in these cases and completely foil the testator's will; see Note (1930) 44 HARV. L. REV. 101, 103.

39. Incidental to the problem of defining dividends from earnings subject to apportionment, there is the question of how to handle distributions of rights to subscribe to a new issue of the corporate stock at its par value. There is also a complicated conflict of theories and decisions on this point. Some authorities have considered them analogous to stock dividends and treated them accordingly. Jones v. Integrity Trust Co., 292 Pa. 149, 140 Atl. 862 (1928); Hostetter's Trust, 319 Pa. 572, 181 Atl. 567 (1935). However, other authorities have insisted that such distributions are in no sense "dividends" and must be regarded as accretions to capital. Matter of Schley, 202 App. Div. 169, 195 N. Y. Supp. 871 (1st Dep't, 1922), *aff'd without opinion,* 234 N. Y. 616, 138 N. E. 469 (1923); RESTATEMENT, TRUSTS (1935) § 236c; 2 PERRY, *op. cit. supra* note 2, § 546. It is believed that this latter view is the correct one, in that the surplus account of the corporation is unaffected by the transaction. For an analysis of the problem of rights, see 4 BOGERT, *op. cit. supra* note 2, § 854.

the terms ordinary and extraordinary has been found. Indeed, the law is not clear as to how such a definition could be formulated. The problem arises whether these terms have any factual or economic meaning, or whether their use in connection with other legal problems could be used as a guide. For instance, the term "ordinary" has been used in connection with the interpretation of fiduciaries acts which provide for the per diem apportionment of dividends "like interest on money lent".[40] These statutory provisions have been construed as applicable only to "ordinary" dividends, or payments at fixed rates and intervals.[41] Therefore, it was formerly thought that these statutes would apply to all dividends which were not subject to equitable apportionment,[42] and that two separate legal incidents would attach to a dividend which was factually not ordinary; it would not be subject to the statute but would be apportionable under the rule of *Earp's Appeal.* Subsequently, however, it was realized that this was not necessarily so [43] and that the term "ordinary" had two separate meanings when applied respectively to the two separate legal problems. A dividend could be neither "ordinary" in terms of the fiducaries act nor "extraordinary" in terms of equitable apportionment. The correctness of this latter view hardly can be seriously questioned, for the degree of regularity required for the application of a fiduciaries act has no necessary connection with the degree of irregularity required for equitable apportionment. Indeed, it might be stated as a general proposition that legal phrases can have no fixed and absolute meaning apart from the problem in which they arise.[44] Hence, a sound consideration of the meanings of the terms ordinary and extraordinary with respect to the doctrine of *Earp's Appeal* must be based on an examination of fundamental reasons for distinguishing between the two types of payments and for holding that only extraordinary dividends are apportionable.

It has often been suggested that the theory underlying the rule of apportionment is one of equitable ownership of undistributed profits. Although it is undisputed that as between corporation and shareholder, undistributed profits are solely the property of the corporation,[45] it is argued that, as between tenant and remainderman, the latter has an equitable right to the estate's share of the undistributed surplus of the corporation as of the date of the creation of the trust.[46] On this theory, the refusal to apportion ordinary dividends has frequently been criticized as contrary to the logic and equity of the Pennsylvania view; [47] and on this basis certain New Jersey courts have decreed that all dividends should be apportioned.[48] In reply, many authorities, although conceding that the refusal to apportion ordinary dividends is illogical, have justified it on practical grounds as a rule of convenience to avoid overburdening the courts.[49]

40. E. g. Pennsylvania Fiduciaries Act of 1917, § 22, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 634 (per diem apportionment at death of life beneficiary).

41. See Thompson's Estate, 6 Pa. D. & C. 503, 506 (1925); Given's Estate, 323 Pa. 456, 461, 185 Atl. 778, 780 (1936).

42. Flaccus's Estate, 283 Pa 185, 129 Atl. 74 (1925).

43. Zell v. Safe Deposit & Trust Co., 196 Atl. 298 (Md. 1938); Nirdlinger's Estate (No. 1), 327 Pa. 160, 193 Atl. 33 (1937).

44. See Equitable Trust Co. v. Prentice, 250 N. Y. 1, 11, 164 N. E. 723, 724 (1928): "what is income in one relation may at times be principal in another. 'Words', as we are told, are 'flexible'."

45. See Moss's Appeal, 83 Pa. 264, 269 (1877); II FLETCHER, *op. cit. supra* note 33, § 5321.

46. See Earp's Appeal, 28 Pa. 368, 374 (1857). In Nirdlinger's Estate, 290 Pa. 457, 469 *et seq.*, 139 Atl. 200, 205 *et seq.* (1927), this theory is set forth at some length with quotations from various other opinions.

47. See HOWES, INCOME AND PRINCIPAL (1905) 25; Note (1929) 3 ST. JOHN'S L. REV. 267, 274.

48. See *supra* note 9.

49. See Earp's Appeal, 28 Pa. 368, 374 (1857); McKeown's Estate, 263 Pa. 78, 85, 106 Atl. 189, 191 (1919); Okin and Brandchaft, *supra* note 9, at 154.

Although there is considerable support for this view, it is not one that will lead to a satisfactory solution to the problem of what dividends should be apportioned. As long as theory and practice are regarded as in conflict, any compromise between the two must inevitably be arbitrary. For instance, the solution suggested in *Nirdlinger's Estate (No. 1)*[50]—that only stock dividends will be apportioned—seems to be an attempt to limit the number of dividends subject to apportionment on a purely arbitrary basis.

It is believed, however, that the whole philosophy of the equitable-ownership theory is misleading in that it shifts the emphasis from what should be the primary consideration of all apportionment questions, namely, the intention of the testator. The few authorities who have recognized that this intent is the fundamental basis of the apportionment doctrine,[51] have had little trouble in seeing that the rule against the apportionment of ordinary dividends is not a rule of convenience at all but one based on the most reasonable construction of the testator's will.[52] When the testator leaves to the life beneficiary the income of his *estate,* he plainly means just that, and not the income of the *corporation* during the period in question. In referring to the income of his estate, he probably has in mind dividends similar to those which he was accustomed to receive during his life, regardless of when the corporation earned them. It is only in the event of distributions which are plainly beyond the scope of the testator's probable contemplation that some equitable adjustment is necessary to protect the rights of the parties. When this occasion arises, the courts try to restore the intact value of the stock as of the date of the creation of the trust, inasmuch as it is a fair presumption that the testator intended to leave to the remainderman shares of stock of approximately the same value that they had at his death.

With this in mind, it is clear that in order to determine whether a particular dividend should be apportioned, factors such as the designation placed upon it by the directors, the source of the dividend, or its form are generally immaterial. The important consideration is whether or not the particular dividend will deplete the corpus of the estate beyond the probable intent of the testator. Did the testator contemplate a dividend of this nature when he left the income of his estate to the life tenant? The type of dividend declared on the stock when owned by the testator becomes significant, for the amount of the disputed dividend in relation to these past dividends usually will be the controlling factor. The most obvious exception would be where the corporation makes a payment of back dividends on preferred shares which have accumulated either before or after the creation of the trust. Although such a payment would probably be far out of proportion to previous dividends, it would be correct to regard it as an ordinary dividend, for even if it accumulated before the creation of the trust, the settlor would have had reason to contemplate its distribution.[53]

It is believed that this view of the problem is in harmony with the factual holdings,[54] if not all the dicta, of the cases. It has been recognized that the defi-

50. 327 Pa. 160, 168, 193 Atl. 33, 37 (1937).

51. See Equitable Trust Co. v. Prentice, 250 N. Y. 1, 8, 164 N. E. 723, 724 (1928): "The search in all these [apportionment] cases was to find the intention of the founder of the trust and then to give effect to it."

52. See Citizens and So. Nat. Bank v. Fleming, 181 Ga. 116, 118, 181 S. E. 768, 770 (1935); Graves v. Graves, 115 N. J. Eq. 547, 552, 171 Atl. 681, 682 (Ch. 1934); Carter v. Crehore, 12 Hawaii 309, 312 (1900); 1 MORAWETZ, CORPORATIONS (2d ed. 1886) § 466. The old English view that all ordinary dividends go to tenant was also based on the theory that the testator would have contemplated ordinary dividends but not bonuses. See Irving v. Houston, 4 Paton 521, 530 (H. L., Scot. App. 1803).

53. See *supra* note 23.

54. Banker's Trust Co. of New York v. Lobdell, 116 N. J. Eq. 363, 173 Atl. 918 (Ch. 1934) (where previous dividends had varied from 10% to 20%, a subsequent 20% dividend was termed ordinary); Hewitt v. Hewitt, 113 N. J. Eq. 299, 166 Atl. 528 (Ch. 1931) (dividends of 1200% annually termed ordinary where there had been previous dividends of that

nition of dividends subject to apportionment cannot be absolute and must vary with the facts and circumstances of each individual case.[55] Furthermore, only a relative definition can obviate the necessity of fixing a static definition of extraordinary dividends which might become obsolete with changing corporate practices. If relative irregularity governs, in the long run the burden on the courts and trustees would not be increased when corporations adopt irregular dividend policies for, in that event, many irregular dividends could properly be considered "ordinary" in these terms. Although absolute certainty will not be accomplished in every case, a clarification of the basis of the definition of dividends subject to apportionment will eliminate much of the existing confusion surrounding the problem.

P. A. B.

Validity of an Ordinary Bailment Contract Limiting Liability of Bailee for Negligence [1]

When a bailee receives possession of the property of another for the benefit of both parties,[2] he will often insist upon a stipulation in the bailment contract intended to relieve him of liability for negligent injuries to the property while it is under his control. It is the purpose of the present discussion to ascertain the effect the courts have given to these stipulations, and to attempt an evaluation of the present trend of the law with respect to this question. Typical situations involving the problem are the parking of automobiles on open lots or their storage in garages;[3] the checking of baggage and parcels in hotel and railroad station checkrooms; and the storage of various types of merchandise in private warehouses.

Typical Contractual Provisions

The usual devices, by which prospective bailees have sought to limit their liabilities on the bailment contract, have been the posting of large signs in conspicuous places and the printing of conditions on the receipt or identification check given to the bailor upon the transfer of the property involved. It is clear that a notice by the bailee, intended to limit liability, will be ineffective if com-

amount); Nirdlinger's Estate, 26 Pa. D. & C. 3 (1936) (without relying on distinctions in form, the lower court decided that where past dividends had varied from $5,000 to $15,000, a subsequent dividend after two years of non-payment of $25,000 was not extraordinary).

55. Nirdlinger's Estate (No. 1), 327 Pa. 160, 169, 193 Atl. 33, 38 (1937).

1. A discussion of the liabilities of common carriers, innkeepers, or public warehousemen, is not within the scope of this note inasmuch as they involve businesses clearly affected with a public interest and usually are the subject of statutory regulation. For a thorough treatment of the instant problem with regard to these types of bailments, see ELLIOTT, BAILMENTS (2d ed. 1929) §§ 115, 180 *et seq.* (innkeepers and common carriers); GODDARD, BAILMENTS AND CARRIERS (2d ed. 1928) §§ 186, 250 *et seq.*; 4 WILLISTON, CONTRACTS (Rev. ed. 1936) p. 2926 (public warehousemen); Hirsch, *Limited Liability of Innkeepers under Statutory Regulations* (1928) 76 U. OF PA. L. REV. 272.

2. The instant problem cannot arise in gratuitous bailments where the promise by the bailor to relieve the gratuitous bailee of liability for damage to the property lacks consideration and consequently there is no contract to enforce.

3. Where the facts are treated by the court as giving rise to a license rather than a bailment, because possession of the chattel was not transferred, the instant problem is not present because the licensor has no duty to take reasonable care of the chattel. Recent examples of cases where the court viewed the situation as a license, are Ashby v. Tolhurst, [1937] 2 K. B. 242; *Ex Parte* Mobile Light & R. R., 211 Ala. 525, 101 So. 177 (1924); Suits v. Electric Park Amusement Co., 213 Mo. App. 275, 249 S. W. 656 (1923); Lord v. Oklahoma State Fair Ass'n, 95 Okla. 294, 219 Pac. 713 (1923).

municated subsequent to the completion of the bailment contract.[4] However, there is judicial conflict with respect to the situation involving a notice given in proper time but not actually received by the bailor. In some jurisdictions, the receipt by the bailor of a check containing a clause limiting liability will not be held to impose such a contractual obligation on the bailor, inasmuch as the check was intended primarily as a token of identification on which an ordinary individual would not expect to find a condition of a contract.[5] Stated otherwise, the mutual assent necessary to the formation of a contract is lacking. A similar result often obtains where the bailee posts a sign limiting his liability but the bailor does not read or see it.[6] However, there is respectable authority to the effect that actual notice of the provision limiting liability is unnecessary if, under all the circumstances, the bailee has taken reasonable steps to give notice.[7] This attitude would appear to be more desirable than the application of arbitrary distinctions, especially in situations where the bailment agreement is hurriedly entered into as in the cases of garages, parking lots, checkrooms and similar establishments. When a large sign has been posted in a conspicuous place and the condition also has been clearly and legibly printed on the front of the identification check, it would unnecessarily burden these enterprises if the bailee were required to notify each customer individually of the presence of the clause limiting liability.[8]

Judicial Attitude Towards the Liability-Exemption Clause

Although the bailee may successfully incorporate a provision limiting liability into the bailment contract, it does not necessarily follow, as will be later shown, that the restrictive condition will be everywhere upheld. However, as early as 1815, Lord Ellenborough had held that a provision in a bailment contract limiting liability for loss by fire was valid and relieved the bailee from responsibility for any damage by fire irrespective of the cause.[9] Since that time, the English law has become well settled to the effect that an ordinary bailee may contract to limit his liability for negligence.[10] Such provisions have been upheld both as a valid exercise of the right of the individual to contract without interference and as a reasonable device for shifting the burden of insurance.

Unfortunately, this phase of the law has not had a uniform development in the United States. In 1907, Professor Willis, studying this problem, found that the law had not yet crystallized but that most courts regarded provisions limiting the liability of a bailee as unobjectionable.[11] He predicted that courts would

4. Dale v. See, 51 N. J. L. 378 (Sup. Ct. 1889); Cothren v. Kansas City Laundry Serv. Co., 242 S. W. 167 (Mo. App. 1922); BROWN, PERSONAL PROPERTY (1936) § 84.

5. Maynard v. James, 109 Conn. 365, 146 Atl. 614 (1929); Brown v. Hines, 213 Mo. App. 298, 249 S. W. 683 (1923); Healy v. New York Cent. & H. R. R., 153 App. Div. 516, 138 N. Y. Supp. 287 (3d Dep't, 1912); Dodge v. Nashville, C. & St. Louis Ry., 142 Tenn. 20, 215 S. W. 274 (1919).

6. Cascade Auto Co. v. Petter, 72 Colo. 570, 212 Pac. 823 (1923); Dietrich v. Peters, 28 Ohio App. 427, 162 N. E. 753 (1928).

7. Missouri Pac. Ry. v. Fuqua, 150 Ark. 145, 233 S. W. 926 (1921); U Drive & Tour, Ltd. v. System Auto Parks, 71 P. (2d) 354 (Cal. App. 1937); Noyes v. Hines, 220 Ill. App. 409 (1920); Van Toll v. South Eastern Ry., 12 C. B. N. S. 75 (1862); Harris v. Great Western Ry., 1 Q. B. D. 515 (1876).

8. For further discussion, in more detail, of this problem, see 6 AM. JUR., BAILMENTS (1937) §§ 177, 178, 189; BROWN, *loc. cit. supra* note 4; (1935) 20 IOWA L. REV. 680; (1923) 22 MICH. L. REV. 154; (1929) 3 U. OF CIN. L. REV. 101.

9. Maving v. Todd, 4 Campb. 225 (K. B. 1815).

10. Van Toll v. South Eastern Ry., 12 C. B. N. S. 75 (1862); Gibaud v. Great Eastern Ry., [1921] 2 K. B. 426 (C. A.); Rutter v. Palmer, [1922] 2 K. B. 87 (C. A.).

11. See Willis, *The Right of Bailees to Contract against Liability for Negligence* (1907) 20 HARV. L. REV. 297.

continue to uphold conditions exempting a bailee from liability for negligence because of the fundamental legal principle that every individual, in the absence of conflict with public policy, should be free to contract as he pleases.[12] He argued that these provisions do not constitute a violation of any rule of public policy inasmuch as there is no injury to the public welfare but, on the contrary, only a question of individual property rights.[13] Furthermore, since consent has always been a bar to a tort action, it was argued that no sound reason existed why it should not constitute a good defense to an action for negligence, as long as injuries to third parties are not contemplated.[14] However, Professor Willis has not proved to be an able prognosticator for the present holdings are hopelessly confused and legal scholars fail to agree as to what constitutes the weight of authority.[15] Seven jurisdictions—Georgia,[16] Illinois,[17] Indiana,[18] Oklahoma,[19] Oregon,[20] Pennsylvania [21] and Washington [22]—have definitely committed themselves to the proposition that any provision limiting the liability of a bailee for negligence is invalid. On the other hand, the Federal courts,[23] four states—Louisiana,[24] Missouri,[25] South Carolina [26] and Texas [27]—and the English courts [28] have upheld conditions exempting bailees from responsibility for negligence and have found that they violate no rule of public policy.

The trend of the law in other jurisdictions in which the problem has been discussed cannot be stated with any degree of certainty. Inferences may be

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12. *Id.* at 301.
13. *Ibid.*
14. *Id.* at 302.
15. Compare 6 AM. JUR., BAILMENTS (1937) §§ 176, 184; 2 BERRY, AUTOMOBILES (6th ed. 1929) § 1627; BROWN, *op. cit supra* note 4, at § 84, with ELLIOTT, *op. cit. supra* note 1, § 18; 15-16 HUDDY, AUTOMOBILE LAW (9th ed. 1931) 70; 1 PAGE, CONTRACTS (2d ed. Supp. 1929) § 766.
16. Renfroe v. Fouche, 26 Ga. App. 340, 106 S. E. 303 (1921), apparently overruling, Evan & Pennington v. Nail, 1 Ga. App. 42, 57 S. E. 1020 (1907).
17. Weinberger v. Werremeyer, 224 Ill. App. 217 (1922); *cf.* Noyes v. Hines, 220 Ill. App. 409 (1920) (railroad checkroom permitted to limit liability to certain amount).
18. Glazer v. Hook, 74 Ind. App. 497, 129 N. E. 249 (1920); Keenan Hotel Co. v. Funk, 93 Ind. App. 677, 177 N. E. 364 (1931).
19. Scott Auto & Sup. Co. v. McQueen, 111 Okla. 107, 226 Pac. 372 (1924) (statute prescribing common law duty of bailees held to define public policy against liability-exemption provision); *cf.* Inland Compress Co. v. Simmons, 59 Okla. 287, 159 Pac. 262 (1916).
20. Pilson v. Tip-Top Auto Co., 67 Ore. 528, 136 Pac. 642 (1913); see Simms v. Sullivan, 100 Ore. 487, 493, 198 Pac. 240, 242 (1921).
21. Baione v. Heavey, 103 Pa. Super. 529, 158 Atl. 181 (1932); Wendt v. Sley System Garages, 124 Pa. Super. 224, 188 Atl. 624 (1936); Downs v. Sley System Garages, 129 Pa. Super. 68, 194 Atl. 772 (1937).
22. Sporsem v. First Nat. Bank of Poulsbo, 133 Wash. 199, 233 Pa. 641 (1925).
23. McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2d, 1903); Interstate Compress Co. v. Agnew, 255 Fed. 508 (C. C. A. 8th, 1919); Fidelity Storage Co. v. Kingsbury, 76 F. (2d) 978 (App. D. C. 1935); see also Santa Fe, P. & P. Ry. v. Grant Bros. C. Co., 228 U. S. 177 (1913).
24. Automobile Underwriters of America v. Laughlin, 6 La. App. 67 (1927); see Marks v. New Orleans Cold Storage Co., 107 La. 172, 180, 31 So. 671, 674 (1901); *cf.* Woodward v. Royal Carpet Cleaning Co., 16 La. App. 555, 134 So. 443 (1931). But see Williams v. H. L. Weil Co., 1 La. App. 188, 190 (1924).
25. Gashweiler v. Wabash, St. Louis & Pac. Ry., 83 Mo. 112 (1884); Wells v. Porter, 169 Mo. 252, 69 S. W. 282 (1902) *semble.*
26. Terry v. Southern Ry., 81 S. C. 279, 62 S. E. 249 (1908); Marlow v. Conway Iron Works, 130 S. C. 256, 125 S. E. 569 (1924).
27. Coffield v. Harris, 2 Tex. Civ. App. 273 (1884); Munger Auto Co. v. American Lloyds, 267 S. W. 304 (Tex. Civ. App. 1924). But *cf.* Langford v. Nevin, 117 Tex. 130, 298 S. W. 536 (1927).
28. See cases cited *supra* note 10. See also in accord RESTATEMENT, CONTRACTS (1932) §§ 574, 575.

drawn from decisions in Mississippi,[29] New York[30] and Tennessee[31] that these courts would uphold a liability exemption condition if presented with the issue. Conflict within each jurisdiction is found in California,[32] Minnesota[33] and Ohio.[34] However, in Alabama,[35] Arkansas,[36] Colorado,[37] Michigan[38] and Nebraska,[39] it has been indicated that such provisions are regarded with disfavor. In view of these additional unfavorable dicta, a statement might be hazarded that a slight weight of authority regards such restrictive stipulations to be contrary to public policy.[40]

Furthermore, many courts have been reluctant to interpret a provision limiting liability for damage as referring to negligence.[41] The opportunity for applying such a strict rule of construction has resulted from the broad, general language in which the condition limiting liability has been phrased, such as, "property is at owner's risk", or "not responsible for damage from fire or theft", without any reference to negligent injuries. It is true that an owner of property will not *ordinarily* forego his right to compensation for injuries which may result from the negligence of another. Therefore, a bailor will not be held to have intended to exempt the bailee from liability for negligence unless the language of the alleged condition is direct and unambiguous. Thus, the provision will not be construed to cover negligent injuries where another interpretation is reasonably possible.[42] Thus stated, the principles propounded seem clear. However, the soundness of their application in the present situation is doubtful inasmuch as the limiting condition is rendered meaningless unless construed to include freedom from liability for negligent conduct. It is well settled that, without the provision, a bailee is not responsible for damage unless he has been negligent.[43]

29. Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921).

30. Herzig v. New York Cold Storage Co., 115 App. Div. 40, 100 N. Y. Supp. 603 (2d Dep't, 1906); Healy v. New York Cent. & H. R. R., 153 App. Div. 516, 138 N. Y. Supp. 287 (3d Dep't, 1912); Galowitz v. Magner, 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't, 1924).

31. Memphis & C. R. R. v. Jones, 2 Head 517 (Tenn. 1859).

32. Compare Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 Pac. 934 (1921) (liability-exemption provision upheld as an exception to general rule against such provisions because of disorganized business situation due to labor strike); U Drive & Tour, Ltd. v. System Auto Parks, 71 P. (2d) 354 (Cal. App. 1937), 22 MARQ. L. REV. 57, with Taussig v. Bode & Haslett, 134 Cal. 260, 66 Pac. 259 (1901); Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664 (1904).

33. Compare Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage Co., 75 Minn. 445, 447, 77 N. W. 977, 978 (1899), with Smith v. Library Board of Minneapolis, 58 Minn. 108, 111, 59 N. W. 979, 980 (1894).

34. Compare Hotels Statler Co. v. Safier, 103 Ohio St. 638, 134 N. E. 460 (1921), with inferences in favor of liability-exemption provision to be drawn from Dietrich v. Peters, 28 Ohio App. 427, 162 N. E. 753 (1928); Union Bus Station v. Etosh, 48 Ohio App. 161, 192 N. E. 743 (1933).

35. See *Ex Parte* Mobile Light & R. R., 211 Ala. 525, 527, 101 So. 177, 179 (1924).

36. See Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249 (1909); Missouri Pac. Ry. v. Fuqua, 150 Ark. 145, 233 S. W. 926 (1921).

37. See Parris v. Jaquith, 70 Colo. 63, 67, 197 Pac. 750, 752 (1920); Denver Union Terminal Ry. v. Cullinan, 72 Colo. 248, 250, 210 Pac. 602, 603 (1922).

38. See Rudell v. Grand Rapids Cold Storage Co., 136 Mich. 538, 99 N. W. 756 (1904).

39. See Gesford v. Star Van & Storage Co., 104 Neb. 453, 456, 177 N. W. 794, 795 (1920).

40. No cases have been found on this point in other jurisdictions.

41. Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249 (1909); Denver Public Warehouse Co. v. Munger, 20 Colo. App. 56, 77 Pac. 5 (1904); Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671 (1901); Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage W. Co., 75 Minn. 437, 77 N. W. 977 (1899); Herzig v. New York Cold Storage Co., 115 App. Div. 40, 100 N. Y. Supp. 603 (2d Dep't, 1906); Langford v. Nevin, 117 Tex. 130, 298 S. W. 536 (1927).

42. See cases cited *supra* note 41.

43. BROWN, *op. cit. supra* note 4, § 81.

Therefore, it seems evident that general language such as "not responsible for damage to the property" is intended to mean damage for which the bailee would otherwise be legally accountable.[44] Likewise, it seems clear that a contract exempting liability for damage from certain enumerated causes, such as fire or theft, refers to fire or theft resulting from the negligence of the bailee. Therefore, courts which have emasculated liability-exemption conditions by such a limited construction of the contract evidently have found this device to be a convenient subterfuge for invalidating stipulations limiting liability for negligence.[45]

Desirability of Enforcement

Although judicial decisions invalidating provisions limiting the liability of a bailee rarely contain more than a brief discussion of the merits of the problem, courts apparently fear that judicial recognition of such provisions will tend to encourage negligence among bailees, to the public detriment.[46] This argument, theoretically compelling, if found to be sound practically, constitutes a real objection to the validity of such contractual obligations. Furthermore, it is occasionally stated that a person may not contract away a duty imposed by law but only those which arise out of his contractual relations.[47] The establishment of a legal duty upon individual members of society expresses the policy of the law with respect to that matter and two persons may not agree to abrogate that duty without violating public policy.

As stated, these propositions are not very helpful in the solution of the present problem. A closer analysis will show them to be misleading. First of all, tort duties are imposed by law, as a result of some relationship which the actor bore to the injured party.[48] Yet, instances exist in which courts have permitted contractual limitations on the individual's liability for breach of these duties. Thus, landlords have been permitted to limit their liability to tenants for defective premises,[49] and railroads as lessors have successfully exempted themselves from liability to their lessees for negligent fires caused by passing locomotives.[50] It has been suggested [51] that these cases may be supported as

44. Santa Fe, P. & P. Ry. v. Grant Bros. C. Co., 228 U. S. 177 (1913) (common carrier acting as private bailee); McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2d, 1903); Berwind White C. M. Co. v. United States, 15 F. (2d) 366 (C. C. A. 2d, 1926); Rosin & T. Imp. Co. v. B. Jacob & Sons, 102 L. T. R. (N. S.) 81 (H. L. 1910); Gibaud v. Great Eastern Ry., [1921] 2 K. B. 426 (C. A.); Rutter v. Palmer, [1922] 2 K. B. 87 (C. A.).

45. This situation was recognized by one court, but it still went on to hold that the liability-exemption clause did not include negligence, Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249 (1909). However, another jurisdiction which had already upheld the validity of a condition limiting liability against negligence, Munger Auto Co. v. American Lloyds, 267 S. W. 304 (Tex. Civ. App. 1924), without directly prejudicing this decision, now interprets such provisions as not intended to refer to negligence unless it is so stated in apt words, Langford v. Nevin, 117 Tex. 130, 298 S. W. 536 (1927).

46. This argument has not been found in any of the bailment cases, but has been expressed in other cases in which contracts limiting liability for negligence have been invalidated. See, e. g., Murphy v. City of Indiana, 158 Ind. 238, 141, 63 N. E. 469, 470 (1902). In 3 COOLEY, TORTS (4th ed. 1932) p. 460, there is the following approximate expression of this viewpoint: "But although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

47. See Otis Elevator Co. v. Maryland Cas. Co., 75 Colo. 99, 107, 33 P. (2d) 974, 977 (1934); Goldman v. White & Davis Inv. Co., 225 Mo. App. 1023, 1028, 38 S. W. (2d) 62, 65 (1931).

48. BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 45.

49. Inglis v. Garland, 19 Cal. App. (2d) 767, 64 P. (2d) 501 (1936); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N. W. 175 (1929). See also Note (1933) 84 A. L. R. 654.

50. Frederick v. Great Northern Ry., 207 Wis. 234, 240 N. W. 387 (1932). See also Note (1927) 48 A. L. R. 1003.

51. See (1936) 36 COL. L. REV. 994.

analogous to contracts indemnifying against non-wilful torts,[52] or providing for liquidated damages.[53] Furthermore, since a primary purpose of tort liability for negligence involves the compensation of the injured party for the damage suffered,[54] it would seem reasonable to allow him to forego for an adequate consideration his right to reimbursement for such injuries as long as no public interest is violated. In this connection, it should be noted that the bailor has ample opportunity, in the usual case, to refuse to accept a condition limiting liability. As has already been indicated, the bailee must take reasonable steps to notify the bailor of any special terms offered as part of the contract. Otherwise, the bailor is not bound by the attempted contractual limitation.[55] Upon receiving notice of the immunity clause, should he fail to agree with the bailee as to its inclusion in the contract, he is free to take his trade elsewhere. In this respect, the ordinary bailment situation differs from that of the common carrier and other public utilities.[56] The latter, as bailees, have superior bargaining powers as far as the public is concerned by virtue of their monopoly on the supply of goods or services offered for sale. It is a simple matter for powerful utilities to compel bailors either to accept limiting provisions or do without the goods or services in question. As a result, courts have generally denied public utilities the right to limit their liability for negligence.[57]

However, in an ordinary bailment transaction, clauses limiting liability for negligence should be upheld until it clearly appears that the theoretical encouragement of negligence alleged to result from these provisions is supported by business experience and that there is no stronger public policy overbalancing this alleged harmful tendency. Liability, resulting in money damages, is certainly not the only deterrent to negligence on the part of bailees. A more important factor encouraging due care on the part of bailees will be found in the pressure of daily competitive business. It seems unlikely that contemporary business men would take advantage of the immunity clause by careless treatment of their customers' property. Moreover, whatever tendency to harm the public lurks in the recesses of such provisions must be balanced against a strong public attitude favoring freedom of contract. "If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice." [58] As a result, courts generally are reluctant to invalidate contracts in the absence of a provision clearly violating some positive rule of law or public interest.[59] Public policy has always been considered a precarious term since, if loosely applied, it may become a scapegoat for all types of improprieties in the administration of justice.[60] Courts have tended to be strict in their use of this device as an invalidating weapon and, wherever possible, have construed contracts in their most favorable light so as to hold them valid.[61] Therefore, before a court will invalidate a contract on the basis of public policy, every

52. See (1920) 20 COL. L. REV. 218; (1908) 22 HARV. L. REV. 306.
53. See 2 WILLISTON, CONTRACTS § 777.
54. HARPER, TORTS (1933) § 2.
55. See *supra* notes 4, 5, 6, 7, 8.
56. See *supra* note 1.
57. ELLIOTT, BAILMENTS (2d ed. 1929) § 180.
58. 5 WILLISTON, CONTRACTS § 1629A, quoting Sir George Jessel in Printing, etc., Co. v. Sampson, L. R. 19 Eq. 426, 465 (1875).
59. See Baltimore & Ohio Ry. v. Voight, 176 U. S. 498, 505 (1899); Weirick v. Hamm Realty Co., 179 Minn. 25, 28, 228 N. W. 175, 176 (1929); 5 WILLISTON, CONTRACTS § 1629A.
60. See Winfield, *Public Policy in the English Common Law* (1928) 42 HARV. L. REV. 76, 91.
61. See Stephens v. Southern Pac. Ry., 109 Cal. 86, 89, 41 Pac. 783, 784 (1895); 5 WILLISTON, CONTRACTS § 1629A.

possible ground for supporting the provision must have failed. Certainly, this should not be so with respect to a provision of a bailment contract limiting the liability of a bailee for negligence. Public policy usually is held to refer to some established interest of society.[62] It is a flexible device varying with the times but always concerned with the public welfare.[63] However, contracts exempting a bailee from liability for negligence are primarily concerned with individual property rights and the alleged tendency to encourage negligence thus is overbalanced by the greater interest in the freedom to bargain as one pleases.[64]

Furthermore, the purpose of the immunity clause may have beneficial aspects. In many instances, the bailee is to have possession of the property for a very short period of time receiving, in return for his services, a very small fee. To a great extent, the size of the fee reflects the intent of the parties with respect to the degree of care expected of the bailee. Therefore, it is reasonable that the bailee should correspondingly be able to reduce his legal responsibility to a minimum.[65] Often, the inclusion of the liability exemption clause is a factor enabling the bailee to charge a smaller fee for his services.[66] The parties themselves, in the absence of statute, should be permitted to decide the amount of the fee and the nature of the risk assumed.

Viewing the problem in another light, some authorities [67] have regarded the provision limiting the bailee's responsibility as merely a means of shifting the burden of insurance. This would appear to be a rational attitude. In most cases, it is easier for the owner to underwrite the common risks to which his property is subjected than for the bailee to insure all property passing through his hands at different times. Inasmuch as this extra burden on the owner may be compensated by a reduction in the fee of the bailee, a strong argument is presented for permitting the parties to handle the problem of burden of risk in this manner.

Quasi-Public Enterprises

This more liberal viewpoint is applicable in most ordinary bailment situations such as garages and private warehouses. The railroad station checkroom deserves special treatment. It differs from the ordinary bailment due to the quasi-public nature of the business.[68] Situated as it is in the business establishment of a public utility, it may more easily coerce the public into accepting its own terms, in view of the inconvenience to the traveler and, often, the impossibility of making other arrangements. As a result, in this situation, public policy should prevent the enforcement of stipulations restrictive of tort liability. However, where the value of the goods is undeclared, he should be allowed to limit his responsibility to a certain amount [69] in order to prevent the concealment of

62. See Nichols v. Hitchcock Motor Co., 70 P. (2d) 654, 658 (Cal. App. 1937); GREENHOOD, PUBLIC POLICY (1886) 1; Willis, *supra* note 11, at 301.

63. See *supra* note 62.

64. See Santa Fe, P. & P. Ry. v. Grant Bros. C. Co., 228 U. S. 177, 188 (1913); Willis, *supra* note 11, at 301.

65. Noyes v. Hines, 220 Ill. App. 409 (1920); Van Toll v. South Eastern Ry., 12 C. B. N. S. 75 (1862).

66. See Harris v. Great Western Ry., 1 Q. B. D. 515 (1876); Gibaud v. Great Eastern Ry., [1921] 2 K. B. 426 (C. A.).

67. McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2d, 1903); Newport News S. & D. D. Co. v. United States, 34 F. (2d) 100 (C. C. A. 4th, 1929); Rosin & Turpentine Import Co. v. B. Jacob & Sons, 102 L. T. R. 81 (H. L. 1910); Rutter v. Palmer, [1922] 2 K. B. 87 (C. A.).

68. See Inland Compress Co. v. Simmons, 59 Okla. 287, 159 Pac. 262 (1916), in which the court treated a cotton warehouse and compress company as a public business and invalidated the exemption provision.

69. Noyes v. Hines, 220 Ill. App. 409 (1920); Terry v. Southern Ry., 81 S. C. 279, 62 S. E. 249 (1908); Van Toll v. South Eastern Ry., 12 C. B. N. S. 75 (1862).

valuables, increasing his risk and subjecting him to the possibility of fabricated claims. However, when the value of the baggage is declared, these dangers are minimized inasmuch as the bailee is able to increase his charge in proportion to the added risk assumed.[70]

Conclusion

In retrospect, the confusion reigning in this field of law appears to be chiefly the result of two factors. First, the unreasonable refusal of many courts to interpret a provision, generally limiting the liability of a bailee to include negligence, has greatly obstructed a logical development in this phase of the law. Furthermore, the apparent failure of most courts to investigate fully the essential considerations involved and the absence of a stated basis for the contemporary judical attitude toward the problem, has created uncertainty among authorities and confusion as to the guiding principles to be applied in the settlement of similar problems in the future. Finally, with the exception of the quasi-public bailee, a variety of strong legal and economic arguments demand that such contract stipulations be upheld as a rational method of attaining desirable ends.

L. S. F.

70. Missouri Pac. Ry. v. Fuqua, 150 Ark. 145, 233 S. W. 926 (1921); Harris v. Great Western Ry., 1 Q. B. D. 515 (1876); Gibaud v. Great Eastern Ry., [1921] 2 K. B. 426 (C. A.).